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SUPREME COURT OF THE UNITED STATES

October Term, 1936

JOSE RIVERA SOLER & CO., INC., *Petitioner*

vs.

THE UNITED FIREMENS' INSURANCE CO. OF PHILADELPHIA,
Respondent

No. 31

SUPREME COURT OF THE UNITED STATES

October Term, 1936

JOSE RIVERA SOLER & CO., INC.

Petitioner,

vs.

THE UNITED FIREMEN'S INSURANCE CO. OF PHILADELPHIA,

Respondent.

MEMORANDUM BRIEF OF PETITIONER SUBMITTED UPON HEARING

In the brief of Petitioner in support of the petition herein we submitted argument and authorities to demonstrate the error of the majority of the United States Circuit Court of Appeals in the judgment complained of with respect to the substantial legal issues involved and stated in "Questions Presented" A, B and C.

We did not submit argument or authorities in support of "Question D" relating to the fundamental error of procedure commited in vacating the judgment of the District Court and ordering an arrest of that judgment rendered and entered on the verdict for Petitioner (Plaintiff), instead of remanding the case for a new trial if its action on the substantial issues was justified by the law.

Though we rely now confidently, as we did when we submitted our former brief, upon the substantial error of the majority of the Circuit Court of Appeals which demands a reversal of its judgment upon rehearing and an affirmance of the judgment of the District Court we feel that we should not pass unnoticed the grave error of procedure by which Petitioner was deprived of its constitutional right to have the issues of fact involved in the case retried by a jury in accordance with the law governing them, in the improbable event that the action of the court on the substantial question of law might have been valid.

The action of the majority of the Circuit Court of Appeals in vacating the judgment of the District Court and ordering an arrest of the judgment on the verdict in favor of petitioner (Plaintiff) was in effect the direction of a judgment in favor of Respondent (Defendant) *non obstante veredicto,* which procedure was held by this court to be unconstitutional and void in the leading case of Slocum vs. New York Life Insurance Co. 228 U. S. 364, which ruling has been followed in numerous cases in this court to the present time.

To all intents and purposes the legal effect of the action of the majority of the Circuit Court of Appeals was precisely what this court condemned in the Slocum case:—

> "In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of pleadings, but that it was warranted by the evidence". (Opinion, page 376).

The verdict and judgment in the present case are the result of the evidence, as was the judgment directed to be entered by the Circuit Court of Appeals in the Slocum case, and it is because of the evidence, as charged in the 10th assignment of error that appellant

below, Respondent herein, and the majority of the Circuit Court of Appeals claim that the judgment of the District Court is a nullity.

The majority decision of the Circuit Court of Appeals upon the rehearing placed mistaken reliance upon the case of Slocum v. Pomeroy, 6 Cranch 221, extending the scope of that decision to fields unexplored by the court and to situations not included in its decision. The concluding remark of Chief Justice Marshal at the close of that opinion seems to imply a negation of the power exercised by the majority of the Circuit Court of Appeals in the present case.

> "After the opinion was delivered, Youngs prayed that the cause might be remanded with leave to amend".
> Marshal, Ch. J:— "Here is a verdict, which must be set aside, before an amendment can be allowed. It might be set aside by the court below, but this court can see no reason in the record for setting it aside."

In that case the judgment below was arrested because of a "fault in the declaration".

The legal defect in a record which justifies an arrest of judgment by an appellate court must be one that is inherent or intrinsic to the existence and maintenance of the cause of action.

The decision of the majority of the Circuit Court of Appeals, complained of, constitutes a tacit admission that in the record up to the moment of the verdict no defect or vice appeared which would have justified the Circuit Court of Appeals in arresting the judgment entered upon the verdict rendered in favor of Petitioner (Plaintiff).

The decision tacitly approves the action of the District Court in refusing to grant the motion of Defend-

ant, (Respondent) for a directed verdict, which in its Paragraph III (Page 13 of the Record) alleged fraudulent overvaluation in the claim and testimony of plaintiff *as it appeared in the evidence,* which action was the subject of the 7th assignment of error (Page 26 of the Record).

The decision complained of is also an admission that the issues of law and fact were properly submitted to the jury.

The decision was based exclusively upon the single point that the discrepancy between the amount claimed by Petitioner (Plaintiff) and that allowed it by the jury constituted fraud as a matter of law which forfeited the right to recover on the policy of insurance; and that when the result of the legal verdict was expressed in a regular and legal judgment the record of that judgment as a matter of law nullified not only the judgment itself but also the complaint and all proceedings thereunder as well.

The jury unquestionably had the right and the power to determine if Petitioner (Plaintiff) had been guilty of fraud in connection with its proofs of loss and to ascertain the amount of such loss in the absence of such fraud.

The contention of the majority of the Circuit Court of Appeals and the effect of its decision are to convert a legal record (in the sense of its invulnerability to arrest of judgment) into an inherent or intrinsic illegal record by the extraneous and regularly legal exercise by the jury of its functions with respect to the evidence of which it was sole judge, and upon the instructions of law which the majority of the Circuit Court of Appeals tacity and impliedly admit were not objectionable. This does not seem to make logical or legal sense.

The majority decision of the Circuit Court of Appeals complained of violated not only the doctrine

firmly established by this court in the case of Slocum vs. New York Life Insurance Co. but it is inconsistent with its own previous decisions.

2. "In an action for breach of an alleged contract for the sale of a sugar plantation, the Circuit Court of Appeals, though finding there was no evidence warranting submission of the case to the jury and that a verdict should have been directed for defendant, cannot, on defendant's writ of error, enter a verdict and render judgment for defendant, but must remand for new trial".
Sucrerie Central Coloso de Porto Rico v. Fajardo, 248 Fed. 432.

We respectfully submit that the judgment of the majority of the Circuit Court of Appeals complained of should be reversed and that the judgment of the District Court of the United States for Puerto Rico should be affirmed.

In the contingency that the action of the majority of the Circuit Court of Appeals in the decision and the judgment complained of should be held to be without error on the substantial question of law involved, we request that such judgment be reversed and the case remanded to the District Court for a new trial in accordance with the principles and rule which this court may establish upon the merits of the case.

San Juan, P. R., September 1936.

JOSE RIVEBA SOLER & CO. INC.,
Petitioner.

FRANCIS H. DEXTER,
Attorney.